Supplementary submission

to

The Portfolio Committee on Safety and Security and
The Portfolio Committee on Justice and Constitutional Development

Re: South African Police Service Amendment Bill, 30 of 2008 and the National
Prosecuting Authority Amendment Bill, 23 of 2008.

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Introduction

1. The Portfolio Committee on Safety and Security and the Portfolio Committee on Justice and Constitutional Development are currently in a process of considering the South African Police Service Amendment Bill, and the National Prosecuting Authority Amendment Bill.

2. The Centre for the Study of Violence and Reconciliation (CSVR) has already made a written submission regarding the two bills (see CSVR submission dated 22 July 2008) as well as making an oral presentation during hearings before the committees on 7 August 2008.

3. The following is therefore a supplementary submission.
   a. During the hearings in Parliament 5-7 August, the chairperson repeatedly invited civil society organisations or members of the public to make further submissions.
   b. In addition following CSVR’s oral presentation on 7 August the chairperson specifically requested CSVR to make further inputs on.
      i. The equality clause.
   c. In addition the chairpersons of the committees have on various occasions made requests for inputs on the specific question of how to strengthen the bills which are currently before parliament.

Focus of this supplementary submission

4. In our original written submission of 22 July and oral submission of 7 August 2008 we motivated for the Directorate for Special Operations (DSO) to be retained and therefore motivated for parliamentarians to vote against the two bills.

5. However this submission has been developed on the basis of requests from the chairs of the committees for concerned persons to make submissions on the specific question of how to strengthen the bills. The key issue of concern here is the SAPS Amendment Act which provides for the creation of a Directorate of Priority Crime Investigation (DPCI).

6. This supplementary submission therefore:
   a. Responds to the specific request from the chair for CSVR to address questions relating to the equality clause and the ICD (see paragraph 3b above);
   b. Makes recommendations for possible amendments to the SAPS Amendment Bill.
The equality clause & principle of equality before the law

Meaning of equality before the law

7. Following CSVR’s oral presentation to the committees the chairperson specifically requested CSVR to clarify what it is saying in relation to ‘the equality clause’.
   a. In our submission CSVR placed considerable emphasis on the principle of equality before the law. Section 9(1) of the Constitution provides that ‘Everyone is equal before the law and has the right to equal protection and benefit of the law’. In so far as the CSVR submission addressed the equality clause it was concerned with this provision which embodies the principle of equality before the law.
   b. We should emphasise that the principle of equality before the law is also implicit to the principle of the rule of law which is referred to as one of the founding values of the Constitution in section 1(c). The rule of law implies that everyone is subject to the law which is the essential meaning of the principle of equality before the law.
   c. The principle of equality before the law includes different components.
      i. Under the apartheid system for instance the law discriminated between people on the basis of race. Some laws only applied to people of one race group but not people of another race group. The law itself therefore denied equality before the law.
      ii. In so far as the law protects people (for instance by granting them certain rights) the principle of equality before the law is undermined when this protection is not provided equally. Thus for instance the Legal Aid Board has been established to try to ensure that poorer people also enjoy the protection of the rights enjoyed in the Constitution if they are arrested.
      iii. A third meaning of equality before the law is that no one should be exempt from the operation of the law irrespective of their wealth, status or power in society.
   d. In so far as the CSVR submission engages with the principle of equality before the law it is primarily in this latter sense. CSVR is concerned that people in positions of power in South Africa should be subject to the operation of the law and that no one should be exempt from the operation of the law by virtue of wealth, status or office.

Implications of weakening equality before the law

8. In our original submission we highlighted a number of issues which are relevant to understanding the significance of equality before the law. In addition to the basic moral principle that all who violate the law should be subject to its operation these issues also help to explain our concern with the principle and the implications of undermining it.
a. **Equality before the law is part of accountability** – accountability does not only involve the obligation to answer before oversight bodies such as parliament or its committees but also involves accountability before the law. Strengthening equality before the law by ensuring that senior officials of the state are accountable to the law implicitly strengthens accountability.

b. **The weakening of equality before the law strengthens the potential for corruption** - The weakening of equality before the law increases the risk of corruption at high levels of government and in other positions of power in society. In so far as they are less accountability before the law there is therefore a greater risk that state power will be abused for corrupt purposes.

c. **Equality before the law promotes respect for the law & trust in governmental institutions** –

i. In evaluating the extent of equality before the law it is not only relevant whether the principal is applied in concrete terms. A separate, though obviously directly related, issue is whether ordinary people believe that the law is a living principle (i.e. one that is applied in practise rather than just being contained in the Constitution). In so far as ordinary people believe that all people are accountable before the law this feeds into greater respect for the law and trust in state institutions.

ii. Respect for the law depends in part on a reasonable element of deterrence arising from the probability of punishment if one commits crime. Yet in a human rights based democracy, respect for the law cannot be built on deterrence alone. Because the state is constrained by standards of due process, it cannot resort to the type of measures that enable authoritarian governments to ensure adherence to the law. As much as it depends on authority, respect for the law therefore also depends on the legitimacy of government and the social system. A crucial element of this is credibility of the criminal justice institutions and of the law itself. Respect for the law and for the institutions of government, and therefore the resilience of society against organised and other crime, can only be built if there is confidence amongst people that all are accountable before the law.

iii. Confidence that the principle of equality before the law is being upheld contributes to confidence about the integrity not only of law enforcement but of the overall institutional framework of government. Such confidence is healthy for democracy and the
rule of law. British criminologist Michael Levi indicates that the success of organised crime in countries like Italy and Russia depends partly on the lack of trust between citizens and government. When serious crime groups come up against societies in which there is firmer trust between citizens, governments and policing agencies ‘Mafia type organisations find an infertile soil in which to grow and … are unsuccessful in the long term’.\(^1\) If people believe that the law is applied selectively this undermines the potential for trust in government and plays into the creation of an environment which is conducive to organised and other crime.

d. **Equality before the law depends on the culture and values of law enforcement** - The degree to which equality before the law is a living principle in any country depends on members of law enforcement agencies and other criminal justice officials believing that it is their duty to uphold the principle and that the state and criminal justice organisations which they work for support them in upholding these principles.

*Impact of the closure of the DSO on equality before the law.*

9. The closure of the DSO will impact on equality before the law in the following ways

a. **Accountability** – The SAPS is by the standards of police agencies elsewhere in the world a giant of an organisation, and therefore exceptionally difficult to subject to scrutiny. Few, if any, of the formal accountability agencies which are provided for in the South African constitution have been able to subject the SAPS to meaningful scrutiny.\(^2\) Due to the fact that they are an investigative agency with sophisticated investigative capacity and powers to investigate crime independently the DSO has been relatively effective in subjecting the SAPS to scrutiny. The dissolution of the DSO reduces the legal accountability of the and specifically the degree to which SAPS members, particularly at a senior level, are subject to the law.

b. **Police corruption** – the SAPS already suffers from a severe problem of corruption. The SAPS closed its Anti-Corruption unit in 2002 and since then has done very little to address the problem of police corruption. (Parliamentary committees and other oversight bodies have also failed to

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give adequate attention to the issue). Units involved in investigating organised crime are amongst the police units which are highly vulnerable to corruption as organised crime groups have access to the resources and contacts to influence police officials. While the DSO on its own does not provide the solution to the problem of police corruption the DSO was effectively the only agency outside of the SAPS with the capacity to investigate organised crime and high level police corruption. The closure of the DSO will therefore further weaken the already weak mechanisms for responding to police corruption in South Africa.

c. **Other official corruption and organised crime** – the closure of the DSO not only weakens mechanisms for addressing police corruption but potentially also weakens the legal accountability of other senior officials of the state. This is partly because the strength of the DSO lay partly in the ‘troika’ approach of investigating teams incorporating investigators, prosecutors and analysts. In addition the closure of the DSO centralises the power to initiate criminal investigations under a single agency whose senior officials are subject to influence by senior state officials. While it does not guarantee the operation of the principle of equality before the law the existence of a diversity of investigative agencies with the independent capacity to initiate investigations into crime and corruption increases the potential for the principle of equality before the law to be a living principle. The SAPS has inherited the culture of the former SAP in terms of which deference to political authority takes precedence over the need to uphold the law. This has been accentuated by an environment of intimidation and the fear of arbitrary censure within the organisation. The current culture within the DSO which has, at least in part, upheld the principle of equality before the law, will therefore be undermined when members of the DSO are incorporated into the SAPS. If it is true that the DSO has been guilty of political bias then the incorporation of DSO members into the SAPS will also do nothing to address this problem. Instead the problem will be reinforced by the prevailing culture within the SAPS.

d. **Respect for the law & trust in governmental institutions** – at the moment respect for the law and trust in state institutions in South Africa is weak. While they were not blemish free the the DSO were in fact one of the few institutions that on balance contributed to greater confidence in the integrity of the legal system and the state and contributed to the belief that there was some substance to the principle of equality before the law in South Africa. The impact of the closure of the DSO will be a further weakening of respect for the law and trust in governmental institutions.

e. **Values and culture of law enforcement** The moves to close the DSO have sent out a message to investigative personnel that the DSO was punished for subjecting powerful individuals to investigation. The enduring impact of the closure of the DSO will be profoundly negative for
the attitudes of law enforcement personnel. One of the lessons that will be internalised throughout the law enforcement community is that those who subject high level political and government officials to investigative scrutiny will be punished for this, directly undermining the potential for cultivating a culture within law enforcement agencies which supports the principle of equality before the law and other constitutional principles. It is likely that this will feed into a cynicism amongst law enforcement personnel about the values which they are supposedly intended to uphold. Cynicism about the values of the organisation in turn feeds into corruption and other abuses.

Counter-acting and limiting the negative impact of the closure of the DSO

10. Policy measures to counter-act the negative impact of the closure of the DSO and to strengthen the criminal justice system therefore need to operate at different level.
   a. **Seek to reduce the scope for manipulation of the criminal justice system by reducing the concentration of power and establishing checks and balances over the authority to initiate investigations** - In so far as concentrating the power to initiate investigations under a single agency (and even a single person) increases the scope for manipulation of the criminal justice system the potential for equality before the law to be realised in practise will be undermined.
   b. **Seek to reduce the scope for manipulation of the criminal justice system by discouraging inappropriate interference in decisions relating to investigation** – In so far as senior officials of criminal justice agencies are subject to pressure or undue influence from senior politicians this increases the risk of inappropriate interference in criminal justice decisions
   c. **Ensure that criminal justice agencies are supportive of the principle of equality before the law and nurture amongst their members a confidence about this.** In so far as there is a perception amongst law enforcement agencies that the state and senior criminal justice officials are hostile to equality before the law this will feed into cynicism about the values contained in the constitution and motivates law enforcement officials against giving effect to the principle of equality before the law.
   d. **Strengthen measures to address police corruption.** In so far as there is a significant problem of police corruption this not only undermines the principle of equality before the law but generally contributes to crime and undermines the effectiveness of the criminal justice system.
   e. **Seek to ensure that there are effective investigations into organised crime.** Being free from manipulation and less vulnerable to corruption will not in themselves ensure that criminal justice agencies are able to investigative organised crime unless they are also able to conduct sophisticated and legally sound investigations.
f. **Strengthen the response to crime and in particular violent crime more generally.** The above type of measures will help to build public respect for the law and trust in state institutions but will also be strengthened if the overall response to crime and in particular violent crime, on the part of the state, is strengthened.

11. Practical proposals aimed at giving effect to the above policy measures are set out below.

### The Independent Complaints Directorate

12. Following CSVR’s oral presentation to the committees the chairperson also requested CSVR to make recommendations for strengthening the Independent Complaints Directorate (ICD).

13. As indicated above (point 9(b)) CSVR has seen the DSO as an important mechanism for addressing police corruption. However when we put forward this argument at the Parliamentary hearings some participants objected to this. They argued that this was in fact the role of the ICD. We would however object to this on two levels:

a. While it is possible to construct an argument that the ICD has a legal mandate to investigate police corruption in practice the ICD is focused on:

   i. **The investigation of deaths in police custody and as a result of police action** – The ICD is obliged in terms of Section 53(2)(b) of the SAPS Act to investigate all such cases and a very large proportion of ICD investigate resources are occupied with such cases. Most of these cases have nothing to do with police corruption.

   ii. **Complaints against the police** – complaints against the police are generally made by members of the public who are dissatisfied with the service which they have received from the police or feel they have been badly treated. Police corruption is generally either (i) a consensual crime committed between someone who is a suspect in a criminal case and a police member, or (ii) a crime which is committed secretively so that the involvement of police is not known to anyone who is likely to complain. As a result complaints against the police generally have very little to do with corruption.

b. Internationally ‘complaints bodies’ such as the ICD, even where they have investigative powers, do not usually have the investigation of police corruption as a core mandate. The Independent Complaints Directorate (ICD) has toyed with the idea of playing a role in anti-corruption investigations and went so far as establishing an anti-corruption command. But the question of investigating police corruption has never been conceived of as a core responsibility of the ICD by role-players in the
safety and security field and the ICD has never been empowered to play a significant anti-corruption role. The ICD simply does not have the authority, independence, systems, capacity or resources to investigate police corruption particularly at a high level or deal with the political consequences of investigating senior level officials of the SAPS. Where it investigates cases successfully these are generally cases of a much more straightforward and ‘routine’ nature and it has not been able to deal with very complex cases.

14. In the light of (i) the generalized need for strengthening the ICD and (ii) the SAPS’s own inadequacies in responding to police corruption and police misconduct more generally, and (iii) the fact that the impending closure of the DSO will further weaken measures to address police corruption CSVR would therefore strongly support measures aimed at strengthening the overall framework for addressing alleged police criminality. Measures that we would support in this regard would include:

   a. **Clarification of the overall framework and of the roles of different bodies** - International models of best practise and sound principals of management motivate that the the primary responsibility for dealing with criminality on the part of the police should be located within the SAPS itself. It is counterproductive to place responsibility for dealing with police criminality in a body which is located outside of the systems of management and authority of the police organisation. The responsibilities of the police in this regard should include:

      i. Establishing proper systems for receiving complaints against police members and for investigating such complaints.

      ii. Establishing proper systems for monitoring the use of force by SAPS members and for investigating deaths and other possible misuses of force.

      iii. Establishing proper systems for identifying police corruption and for investigating such corruption.

      iv. The SAPS should be obliged to report on its measures to fulfil such obligations to parliament in its annual report (see also point 14(b) (iii) below).

   b. **An oversight body such as the ICD should essentially function as a check on the police to ensure that the police are adequately addressing such problems.** In order to be able to effectively fulfil such a role the oversight body should be provided with the necessary authority and

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resources to do this. Measures which we would motivate for in this regard would include:

i. Increasing the status of the Executive Director of the ICD so that the ICD Director has greater status and authority within the public service.

ii. Redefining the identity (including the name), role and mandate of the ICD including:

1. Providing the ICD with a more flexible mandate so that the ICD is able to prioritise cases for investigation, monitoring etc, though being accountable to Parliament for how it does this.

2. The ICD should not be conceived of as a first port-of call for people with complaints against the police but rather as a fall-back option for people who (i) are dissatisfied with the way in which their complaints have been dealt with by the police or, (ii) are afraid to take their complaints directly to the police.

3. Potentially changing the name of the ICD.

iii. Clarifying the powers of the ICD to confirm its authority to intervene in any matter falling within its mandate and where it does not have the confidence that the police are dealing with the matter properly.

iv. Obliging the SAPS to report to Parliament on how it has responded to (i) cases which have been referred to it by the ICD; (ii) recommendations for disciplinary action which have been made by the ICD; (iii) other recommendations or concerns which have been addressed to the SAPS by the ICD.

v. Retaining and strengthening provisions in the SAPS in terms of which the SAPS is obliged to report certain events, such as deaths as a result of police action or in police custody, to the ICD.

vi. Dramatically strengthening the corruption investigating capacity of the ICD – as part of measures to strengthen and better resource the ICD the ICD should be supported in developing the capacity to carry out complex investigations particularly into police corruption which is linked to organised crime. It is a pity for instance that the ICD has not been seen as a potential destination for investigators who will be moved out of the DSO when it is closed.

15. In line with point 10(c) we are in favour of strengthening measures to prevent police corruption. However as indicated in paragraph 13b above the type of
measures which we have in mind in this regard are quite dramatic in terms of their implications for the ICD. We do not envisage that these types of measures could be considered without a proper process of consultation with the ICD and other role-players in this field. In the following section we have therefore made recommendations on how to strengthen the provisions of the SAPS Act in relation to the concerns raised in paragraph 10 which pertain to the DPCI. However we have not made recommendations relating to legislative provisions regarding the ICD as we do not envisage that these could be considered without a process which involves other role-players.

Proposed revisions to the SAPS Amendment Bill, 30 of 2008.

16. The following are recommendations aimed at strengthening the current SAPS Amendment Bill which are intended to give effect to the policy concerns raised in paragraph 10.

a. **Proposed revision 1:** Section 3 of the Bill should be amended by the amendment of Section 16A(1) to provide that: There is hereby established a Directorate of Priority Crime Investigation. The principal function of the Directorate shall be to combat and investigate any criminal conduct or endeavour thereto as set out in section 16(2) especially in so far as such criminal conduct or endeavour contributes to violence or threatens the security of the state or undermines the integrity of state institutions.

**Motivation:** The proposal is intended to engage with concerns relating to the lack of clarify regarding the mandate of the DPCI. Section 16(2) as it currently stands does not provide clarity on the focus of the unit or why it is being established. Critics of the DSO have raised questions about whether DSO investigations gave adequate attention to dimensions of organised crime that are linked to the prevalence of violent crime. Alongside this criminal conduct which threatens state security is also potentially of concerns. The reference to conduct which undermines the integrity of state institutions is intended to emphasise the importance of addressing corruption.

b. **Proposed revision 2:** Section 3 of the Bill should be amended to provide:

i. At (2)(a) that the head of the Directorate for priority crime investigation shall be appointed as a Deputy National Commissioner.

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See for instance submission by Business Against Crime, paragraph 5.2.
ii. At (4) that: other than as provided for in Section 16(B)(1) (see c. below) the head of the DPCI shall report to the National Commissioner.

Motivation: The appointment of the head of the DPCI as a Divisional Commissioner would amount to a demotion. In order to ensure the status of the unit as well as to ensure the best calibre of leadership for the unit it would be important to appoint the head of the DPCI at a rank which is the same as that of the head of the DSO.

c. Proposed revision 3: Section 3 of the Bill should be amended by the deletion of Section 16A(15) and Section 16B(c). Section 16B(1) should be amended as follows

A. The reference in 16B(1)(a) to subsection (11) should be amended to refer to subsection (10).
B. Subsection (b) should be retained as is.
C. Subsection (c) should be amended to provide that: If on the basis of such investigation or preparatory investigation the head of the DPCI believes that evidence relating to an offence which is not being investigated by the DPCI has been disclosed, he or she may:
   i. If the head of the DPCI believes that the case is one which justifies the involvement and direction of a prosecutor from the National Prosecuting Authority or for any other reason, the head of the DPCI may inform the National Director of Public Prosecutions who
      i. May approve the investigation, and
      ii. May appoint a prosecutor to give direction to the investigation if this is necessary.
   ii. If the head of the DPCI believes that the case is one which does not justify the involvement of the National Prosecuting Authority at this point or for any other reason, the head of the DPCI may inform the National Commissioner who may approve such investigation, or refer the matter to another unit or Provincial Commissioner.
D. A new subsection (d) should be inserted to the effect that: In the event that the National Director of Public Prosecutions approves an investigation in terms of subsection he must inform the National Commissioner unless in his/her judgement there are substantial and compelling reasons not to do so.
E. A new subsection (e) should be inserted to the effect that: The National Commissioner and National Director of public prosecutions may refer any matter to the Head of the DPCI for investigation in which case the matter shall be regarded as one which is approved in terms of clause 2 above.

5 The point is made in Business Against Crime submission paragraph 5.2.
Motivation: Various parties have raised concerns about (i) the loss of the interface between prosecutors and investigators which was one of the features of the DPCI; (ii) the concentration of power under the SAPS National Commissioner; and (iii) the need for a process for authorisation of the investigation of cases dealing with corruption by high level members of the SAPS. The proposed provisions are intended to respond to these concerns. They are partly based on the model of the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime. While located within the national police agency it is subject to the authority of the Director of Public Prosecutions in relation to the investigation of individual cases.

d. Proposed revision 4: Section 16A(16) of the Bill should be deleted in its current form and should provide that: The Minister in consultation with the Minister of Justice, the National Commissioner, the Head of the DPCI, the Divisional Commissioner responsible for crime detection and investigation and crime intelligence, and the National Director of Public Prosecutions shall establish a forum to address and clarify questions of overlapping mandates between different units and questions of coordination and cooperation between them in order to ensure the optimum effectiveness of the criminal justice system in addressing crime and to ensure that priority crime problems are being effectively investigated.

Motivation: The forum provided for in the current Section 16A(16) has a vaguely defined mandate and will serve little purpose. Other proposals motivate for coordinating bodies but sometimes this is confused with an oversight function. The proposal here is based on the assumption that tensions between the DPCI and other components of the SAPS and criminal justice system are likely but that this needs to be addressed firstly of all at an operational level. Furthermore the body is intended to address issues of strategy and overlap at an operational level. This is therefore a coordinating rather than an oversight body.

e. Proposed revision 5: A new subsection should be inserted under section 16A after Section 16A(2) to provide that:

i. No organ of state and no member or employee of an organ of state nor any other person shall interfere with the Head of the DPCI or a member of the personnel of the directorate in the exercise and performance of his or her powers and functions.

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6 See Business Against Crime submission 5.3
7 On the last point see ISS submission paragraph 44c.
ii. The Minister is required to keep a register of all directions given to the National Commissioner which pertain to the DPCI and shall submit the register on an annual basis to the Parliamentary Committees.

Motivation: One of the principle issues which has given rise to hostility to the DSO have been suspicions that the DSO has been an instrument of political manipulation and has been involved in investigations which have amounted to political targeting. The proposed provision is therefore intended to strengthen the independence of the unit and protect it against inappropriate interference. The first provision is based on Section 50(3)(a) of the SAPS Act which protects the independence of the ICD. It would be reasonable to also incorporate a provision along the lines of Section 50(3) (b) which provides for sanctions for such interference. The second provision is based on Section 4.6 of the Queensland (Australia) Police Service Administration Act 1990 which is intended to prevent inappropriate political interference in policing by the politicians. Similar provisions have also been implemented in other Australian states.

f. Proposed revision 6: A new subsection should be inserted under section 16A after Section 16A(2) to provide that: The head of the DPCI shall ensure that:

i. In selecting matters for investigation and in carrying out investigations the DPCI is guided by the principles of the rule of law and equality before the law provided for in the Constitution.

ii. Adequate measures are introduced to ensure that DPCI members conduct themselves in terms of high standards of integrity.

Motivation: Concerns to do with the potential for the principle of equality before the law to be undermined and weakness in systems for addressing police corruption have already been mentioned in this submission. These provisions are intended to make explicit the obligation of the head of the DPCI to engage with these concerns.

g. Proposed revision 7: The question of the appointment of the head of the DPCI should be explicitly addressed in the Bill. Such provision might provide that the head be appointed by the Minister after consultation with the National Commissioner.

Motivation: As indicated above and in other submissions there are concerns about the concentration of power under the national commissioner. This is another measure intended to address these concerns.
Conclusion

In this supplementary submission we have tried to answer questions relating to our concerns about the impact of the closure of the DSO on the principle of equality before the law and have made recommendations on how the SAPS Amendment Bill may be strengthened in order to address these concerns. We have also provided our views on the type of measures which would assist in strengthening oversight over the SAPS through the ICD partly with a view to strengthening the response to police corruption. We hope that our inputs will be of some value to the committees in considering the two bills and in their general engagement with the oversight of the SAPS and other components of the criminal justice system.

End of CSVR Supplementary Submission (21 August 2008)